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No. 09-1208

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

LAURENCE K. LIBBERTON,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF

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CAPITAL CASE
QUESTIONS PRESENTED

The state trial judge who presided over Laurence Libberton's trial and who sentenced Libberton to death also presided over Libberton's post-conviction proceedings. In Libberton's third post-conviction proceeding, the judge rejected a claim that defense counsel was ineffective at sentencing for failing to produce more evidence that Libberton was a "follower" and that he had a difficult relationship with his father. The court ruled: "Having presided at the trial of this case, this court is of the opinion that nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing. . . . The defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys."

1. Did the Ninth Circuit err by finding on federal collateral review that the state court's ruling regarding ineffective assistance of counsel at sentencing was "unreasoned" and by thereafter failing to reference the AEDPA deference standard in analyzing whether Libberton was prejudiced by counsel's alleged deficiencies, even though the state court ruling tracks the analysis this Court requires under *Strickland*?

2. Did the Ninth Circuit err by granting habeas corpus relief on Libberton's ineffective assistance of counsel claim based on evidence that Libberton was a "follower" and had an abusive relationship with his father, when this

evidence was essentially cumulative to what was presented at sentencing and the post-conviction judge expressly found that this type of evidence would not have changed the sentencing decision?

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INTRODUCTION

Libberton's statement that this case presents "no sound reason to differentiate this case from the many capital cases where state officials merely disagree with the conclusion of a lower court" (Brief in Opposition, at 1) is erroneous. Instead, this case provides an extraordinary example of a federal court's failure to properly accord deference under the AEDPA to state court factual findings and state court interpretations of federal law as determined by this Court.

The Ninth Circuit's ruling eviscerates the deference standard set forth in 28 U.S.C. § 2254. There was nothing unreasonable about the state courts' application of *Strickland*. On post-conviction review, the same judge who had sentenced Libberton found, after considering all of Libberton's newly proffered mitigation evidence, that Libberton received the effective assistance of counsel and "nothing [Libberton] has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing."

Although there is not a panel or *en banc* dissent in this case, Chief Judge Alex Kozinski, in authoring a dissenting opinion in *Pinholster v. Woodford*, 590 F.3d 651, 685 (9th Cir. 2009), specifically referenced this case, together with another Ninth Circuit case from Arizona, *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009), and several other cases, as examples of "a series of mistakes that have unfortunately, become far too common in our circuit." Noting the Ninth Circuit's

reliance on evidence never presented to the state courts and "perhaps worst of all" a failure to defer to state court rulings, Chief Judge Kozinski stated that the Ninth Circuit has "perpetuate[d] a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted." *Pinholster*, 490 F.3d at 685.

The ruling rendered below continues a practice in which death sentences are routinely set aside by the Ninth Circuit notwithstanding reasoned state court decisions that properly apply controlling authority from this Court. To set aside Libberton's death sentence, the Ninth Circuit inappropriately concluded that the state court's decision was "unreasoned" based simply on its abbreviated length and without due consideration that the state court complied with the "clearly established" law of this Court. Furthermore, in analyzing Libberton's ineffective assistance of counsel claim, the Ninth Circuit simply accepted at face value all of Libberton's proffered mitigation evidence, essentially cumulative in nature, without considering how this mitigation would be weighed by the sentencer.

ARGUMENTS

I

THE NINTH CIRCUIT'S MISCHARACTERIZATION OF THE STATE COURT RULING AS "UNREASONED" IMPROPERLY ABROGATES THE CORNERSTONE AEDPA REFORM THAT REQUIRES DEFERENCE TO STATE COURT RULINGS.

Contrary to the Ninth Circuit's finding that the state court's ruling was "unreasoned," the state court followed this Court's "clearly-established" law as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), addressing both deficient performance and prejudice. *See* 466 U.S. at 697—88. Although not lengthy, the state post-conviction court's decision went to the heart of *Strickland*—namely, an analysis of whether defense counsel failed to do something that would have affected the outcome of the trial or sentencing. Thus, the state post-conviction court's decision was reasoned in light of this Court's jurisprudence.

Libberton argues that the state court's ruling was not consistent with this Court's jurisprudence, largely because the state court denied Libberton an evidentiary hearing regarding his proffered mitigation evidence. (Brief in Opposition, at 10—11.) There is no constitutional duty to conduct an evidentiary hearing. Taking at face value the affidavits Libberton submitted, the state court concluded that the proffered

evidence would not have changed the sentencing determination.

Libberton also contends, citing *Rompilla v. Beard*, 545 U.S. 374, 381 (2005), that counsel was ineffective for failing "to investigate readily available evidence supporting a life sentence." (Brief in Opposition, at 12—13.) However, this case is unlike *Rompilla*, where counsel failed to act even though potentially powerful mitigation was readily apparent from documents any reasonable attorney would have obtained. *Rompilla*, 545 U.S. at 389—93. Instead, this case is more closely akin to *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), where defense counsel's "'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell "well within the range of professionally reasonable judgments.'" *Van Hook*, 130 S.Ct. at 19 (citing *Strickland*, 466 U.S. at 699). As this Court has recognized, at some point, mitigating evidence becomes cumulative. *Id.*; *see also Wong v. Belmontes*, 130 S.Ct. 383, 387 (2009) ("Some of the evidence was merely cumulative of the humanizing evidence [the defendant] actually presented; adding it to what was already there would have made little difference.").

The Ninth Circuit failed to apply AEDPA's deferential standard in evaluating the state court's resolution of Libberton's post-conviction ineffective assistance of counsel claim. For example, the Ninth Circuit's conclusion—that had Libberton's mother, sister, and childhood friend testified, there is a reasonable probability that the sentencing court would have imposed a lesser sentence—is unreasonable given

the state post-conviction court's consideration of affidavits from these individuals and its subsequent rejection of Libberton's claim of ineffective assistance of counsel.

The affidavits of Libberton's mother, sister, and childhood friend were not only cumulative to the evidence presented at Libberton's sentencing proceeding, but considered by the same court during post-conviction proceedings. The district court acknowledged that Libberton's mother, sister, and childhood friend were closer to Libberton and knew him better than the two witnesses who testified at sentencing, but properly characterized the evidence as being essentially similar to what was presented at sentencing. (Pet. App. B—143—44.) The Ninth Circuit should have deferred to the post-conviction court's resolution of this claim.

II

THE NINTH CIRCUIT'S RULING EVISCERATES THE PREJUDICE PRONG OF THE *STRICKLAND* ANALYSIS AND FAILS TO APPLY THE DEFERENTIAL STANDARD REQUIRED BY THE AEDPA.

A. *The Ninth Circuit Failed to Properly Defer to the State Court's Analysis of Libberton's Post-Conviction Claim.*

Libberton argues that the state post-conviction court's decision contained no "'analysis' of Libberton's

claims and evidence, much less one that required deference." (Brief in Opposition, at 13.) Libberton contends that the state court rendered an "unreasoned one-sentence ruling," even though the state post-conviction judge—the same judge who sentenced Libberton—considered Libberton's post-conviction petition, "supported by sixteen exhibits, multiple affidavits, [and] a request for funds to pursue needed discovery and a hearing," prior to rendering a decision. (*Id.* at 13, 14—15.) Both the sentencing court and the post-conviction court considered the evidence that Libberton now claims was of "critical importance." (*Id.* at 14.)

Libberton asserts that "even a minimally competent investigation" could have transformed the mitigation case. (*Id.*) Specifically,

> [h]ad Lim investigated, he could have presented the testimony of Daniel Severance, Diana Hodge, Daniel McIntosh, and "readily available" juvenile records of key witness [Martin] Norton that showed Norton an astoundingly incredible and unreliable witness. . . . He also could have presented the detailed testimony of Libberton's family and friends who explained, among other things, the trauma and repeated abuse he endured as a child, and his father's terrible beatings and ultimate rejection of him.

(*Id.*) Libberton discounts the fact that the proffered

testimony of these individuals concerning Libberton's role as a "follower" in the murder and Libberton's abusive relationship with his father was already before the post-conviction court in the form of affidavits. Those affidavits were merely cumulative to the verbal testimony and argument already presented at Libberton's sentencing hearing. (Petition for Writ of Certiorari, at 19—23.)

The Ninth Circuit relied on the affidavits of Daniel Severance, Diane Hodge, and Daniel McIntosh to conclude that counsel failed to discover evidence demonstrating that the murder was "the result of James's instigation and that Libberton was merely a follower." *Id.* at 1171—72. However, while Hodge could have testified that "any involvement by [Libberton] in the killing was much less than that of either James or [accomplice] Norton," and "Severance speculated that James's aggressive demeanor may have 'influenced' [Libberton] to follow along in the crimes," that testimony would not have changed the outcome of trial. "Neither Hodge nor Severance were eyewitnesses to the crimes" and "[e]ven if James was the prime motivator behind Maya's murder," Libberton's involvement was more than passive acquiescence to directives from James. This was not a "spur of the moment" crime. Libberton planned this crime with James over a period of several hours, held a gun on Maya during the two-hour drive to the mine shaft, and actively participated in the brutal beating and murder of Maya. Libberton was anything but a passive follower.

The Ninth Circuit improperly relied on affidavits

that could have been presented in state court, but were not. For example, the Ninth Circuit found that counsel should have interviewed McIntosh to try to establish Libberton's alcohol and drug use. However, counsel participated "in a pretrial deposition of McIntosh on December 28, 1981, at which McIntosh was examined on the issues of both James's and [Libberton's] culpability and their use of alcohol and drugs. McIntosh stated, and repeated at trial, that he left James's trailer before Juan Maya arrived and had no direct knowledge of what transpired." (Pet. App. B—111.) Furthermore, Libberton "has not shown that if counsel had conducted another interview it would have provided additional persuasive evidence at trial regarding [Libberton's] culpability or his use of alcohol and drugs around the time of the crime." (*Id.* at B—112.) Despite the Ninth Circuit's improper reliance on McIntosh's affidavit, the affidavit merely provided evidence that was cumulative to that found wanting by the state court.

Libberton also contends, and the Ninth Circuit erroneously agreed, that counsel was ineffective for failing to examine Norton's juvenile record for impeachment purposes and to "undermine[] Norton's portrayal of Libberton as a co-equal participant with James in Maya's murder." *Libberton v. Ryan*, 583 F.3d 1147, 1172 (9th Cir. 2009). In contrast, the district court appropriately rejected Libberton's claim that Norton could have been "a favorable witness about [Libberton's] comparatively limited role in the alleged crimes," noting that while Norton's statements to authorities differed over time, "each statement implicate[d] [Libberton] as an active participate in the

crimes against Maya." (Pet. App. B—112—113.) Furthermore, counsel Lim thoroughly cross-examined Norton regarding his inconsistent statements.

The Ninth Circuit ignored the fact that, although evidence existed concerning James' character and his propensity for violence on other occasions, that information was of limited relevance here, particularly given that Libberton had already presented evidence regarding James' bad character and his role as the leader in Maya's murder. Any additional evidence that James was violent would have been cumulative. Such cumulative evidence does not provide a basis for granting federal habeas relief. *See Van Hook*, 130 S.Ct. at 16—17.

B. *The Ninth Circuit Essentially Rewrote the* Strickland *Prejudice Prong By Granting Relief Without Considering the Facts and Circumstances of the Crime, the Death-Qualifying Aggravating Circumstances, and Relevant Arizona Law.*

In analyzing the reasonableness of the state court's post-conviction ruling, the Ninth Circuit essentially presumed prejudice on the basis of its examination of mitigation evidence and failed to consider all the relevant evidence the sentencer would have considered, including the facts and circumstances of the crime and "the entire body of aggravating evidence." This directly conflicts with this Court's directives to the contrary in *Belmontes* and *Van Hook*. *See Belmontes*, 130 S.Ct. at 386; *see also Van Hook*, 130 S.Ct. 13. Given the facts and circumstances of

Maya's murder and the aggravation findings in this case, there is no reasonable probability that additional, largely cumulative mitigation would have changed the sentence.

Notwithstanding opportunities in both state and federal court to develop evidence that could have been presented at sentencing, the record shows only that Libberton's post-conviction counsel unearthed additional cumulative evidence. Accordingly, the Ninth Circuit violated AEDPA's mandate requiring deference to the state court's resolution of Libberton's post-conviction claims, particularly given the fact that the post-conviction decision was made by the same judge who sentenced Libberton and who was uniquely qualified to assess the prejudice prong of the *Strickland* analysis. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (noting that post-conviction judge was "ideally situated" to evaluate ineffective assistance claim because she had also been the judge who imposed sentence).

In his dissenting opinion in *Pinholster*, Chief Judge Kozinski's description of the Ninth Circuit's flawed review of ineffective assistance of counsel claims in this and other cases is particularly apt and highlights the need for corrective action by this Court:

> The majority reaches the contrary conclusion [that the habeas petitioner is entitled to relief on a claim of ineffective assistance] through a series of mistakes that have, unfortunately, become far too common in our circuit. First, the majority

relies on evidence never presented to the state courts and that we may therefore not consider in federal habeas proceedings governed by AEDPA. *Contra Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 437—40, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Second, the majority applies retrospectively a standard for counsel's performance that bears no relationship to that prevailing at the time of Pinholster's trial in 1984. *Contra Bobby v. Van Hook*, __ U.S. __, 130 S.Ct. 13, 18—19 (2009) (per curiam). Third, and perhaps worst of all, the majority accords no deference to the California Supreme Court's superior expertise in determining what constitutes competent representation among the members of its bar and the likely consequences (or lack thereof) of any deficient performance. *Contra Schriro v. Landrigan*, 550 U.S. 465, 473—74, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).

Few state court judgments can withstand even one such error, *see, e.g.*, *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009); *Gilley v. Morrow*, 246 Ved.Appx. 519 (9th Cir. 2007) (unpublished); *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004); see also cases cited pp. 692, 711 infra, but in combination they are deadly. I had hoped

> that our en banc court would sweep away these mistakes and bring our caselaw into conformity with AEDPA. Instead, the majority repeats and magnifies the errors in these prior cases so that they will be very difficult, probably impossible, for us to correct. This perpetuates a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted. Because I don't believe we are the ultimate font of wisdom on such matters, I must dissent.

Pinholster, 590 F.3d at 685. *See also Robinson v. Schriro*, 595 F.3d 1068, 1117 (9th Cir. 2010) (Rawlinson, J., dissenting) (noting the Ninth Circuit's failure to properly apply the prejudice analysis required under *Van Hook* and *Belmontes*); *Stanely v. Schriro*, 598 F.3d 612, 628, fn. 3 (9th Cir. 2010) (Kleinfeld, J. concurring in part and dissenting in part) (referring to "unspoken rule" in the Ninth Circuit "that anyone sentenced to death had ineffective assistance of counsel during the sentencing phase of his trial or at least needs an evidentiary hearing decades after sentencing to find out"). This Court should grant certiorari review to change the Ninth Circuit's errant analysis and mandate proper deference to reasoned state court decisions.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the Ninth Circuit's ruling with respect to sentencing.

Respectfully submitted

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